A **DATO' AHMAD REJAL ARBEE & ANOR v. MAHFUZ OMAR**

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
AZIAH ALI JCA
LIM YEE LAN JCA
B [CIVIL APPEAL NO: W-02-1643-07-2012]
17 MARCH 2015

TORT: *Defamation – Defences – Justification and qualified privilege – Allegations in newspaper report that plaintiff misbehaved and created nuisance during* C *Parliamentary debate – Newspaper report conflicted with Hansard report – Whether material facts omitted in newspaper report – Whether there was selective reporting – Whether defendants acted with malice – Whether defences ought to be allowed*

The respondent ('the plaintiff') was a Member of Parliament ('MP') and a senior member of the Parti Islam Se-Malaysia ('PAS') whilst the first D appellant was an employee of the second appellant ('the defendants'). The second appellant was the publisher and printer of Berita Harian of which the first appellant was the group editor. The subject matter of the plaintiff's defamation action was a piece of news published in Berita Harian under the heading 'Mahfuz ajak wakil BN bertumbuk', which alleged that the plaintiff E had misbehaved himself and created a nuisance during a debate in Parliament on 8 November 2000 by challenging another MP ('YB Shahziman') to a fist fight outside the Parliament building. The High Court Judge found the defendants liable for defaming the plaintiff and had awarded damages. The defendants appealed against both liability and quantum of damages and F raised, among others, the defences of justification and qualified privilege. The defendants claimed that what was published about the plaintiff in the newspaper report was a true account of what had transpired in the Parliament during the debate.

Held (dismissing appeal with costs)
G **Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:**

(1) A comparison between the *Hansard* report and the newspaper report revealed that there were obvious omissions of material facts in the latter. The trial judge had found that the defendants had merely taken the H portion of the sequence of events during the Parliamentary debate *viz*, the words of the plaintiff that could infer the plaintiff as a violent and uncouth person and printed and published the words. Thus, there was no justification to interfere with the findings of the trial judge and his rejection of the defence of justification. (paras 19, 23 & 24)

I **(2)** There was failure on the part of the defendants to mention in the newspaper report on the provocative conduct of YB Shahziman. The defendants had also omitted the words uttered by the plaintiff in the Parliament, as reported in the *Hansard*, which clearly showed that the

plaintiff was not the party that had acted in a provocative manner. He was merely responding to the challenge for a fight by YB Shahziman; and that the plaintiff had said twice that he came to Parliament not to fight with anyone but to participate in the debate. In the light of the *Hansard*, *via* the newspaper report the defendants had placed the plaintiff wrongly, in a bad light. In other words, far from stating the truth, the news in the newspaper was nothing but a distortion of what had actually transpired in Parliament. (paras 26-28)

(3) The allegation against the plaintiff was serious considering that he was an MP and it was about the alleged unruly and aggressive behaviour in Parliament. Although the reporter stated that the atmosphere then in Parliament during the debate was chaotic, yet neither the reporter nor the first defendant, as an editor, took steps to verify the facts by waiting for the *Hansard* report and there was also no urgency to publish the news. The defendants made no effort to seek the comments from the plaintiff on the incident, particularly to obtain his version of what had actually transpired. The news was not a matter of public importance. In any event, there was malice on the part of the defendants as shown by the manner the incident was reported; there was a deliberate act of 'pick and choose' and 'blacking out' of facts that were favourable to the plaintiff. (para 37)

(4) Considering the status of the plaintiff as an MP and his senior position in the PAS party, the seriousness of the allegation and the fact that there was malice on the part of the defendants, the award for aggravated damages was fair. (para 38)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('plaintif') adalah Ahli Parlimen ('MP') dan ahli kanan Parti Islam Se-Malaysia, sementara perayu pertama adalah pekerja perayu kedua ('defendan-defendan'). Perayu kedua adalah penerbit dan pencetak akhbar Berita Harian di mana perayu pertama merupakan pengarang kumpulan. Perkara dan tindakan fitnah oleh plaintif adalah berkaitan dengan suatu berita yang diterbitkan dalam Berita Harian di bawah tajuk 'Mahfuz ajak wakil BN bertumbuk', yang mendakwa bahawa plaintif telah berperangai buruk dan menimbulkan kacau ganggu semasa debat di Parlimen pada 8 November 2000 dengan mencabar seorang MP yang lain ('YB Shahziman') untuk bertumbuk di luar bangunan Parlimen. Hakim Mahkamah Tinggi mendapati bahawa defendan-defendan bertanggungan kerana memfitnah plaintif dan mengawardkan ganti rugi. Defendan-defendan merayu terhadap liabiliti dan kuantum ganti rugi. Defendan-defendan menghujahkan bahawa apa yang diterbitkan mengenai plaintif dalam laporan akhbar tersebut adalah apa yang sebenarnya telah berlaku di Parlimen semasa debat tersebut.

A **Diputuskan (menolak rayuan dengan kos)**
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Perbandingan antara laporan Penyata Rasmi dan laporan akhbar mendedahkan bahawa terdapat peninggalan fakta-fakta penting yang jelas
B dalam akhbar. Hakim bicara telah mendapati bahawa defendan-defendan hanya mengambil sebahagian perkara yang berlangsung semasa debat Parlimen tersebut, iaitu, perkataan-perkataan oleh plaintif yang membawa maksud tersirat bahawa plaintif seorang yang ganas dan kasar dan telah menerbitkan dan mencetak perkataan-perkataan tersebut. Oleh
C itu tidak ada justifikasi untuk campur tangan dengan dapatan-dapatan hakim bicara dan penolakan pembelaan justifikasinya.

(2) Terdapat kegagalan pada pihak defendan-defendan untuk menyebut dalam laporan akhbar tersebut berkaitan dengan tindakan provokasi oleh YB Shahziman. Defendan-defendan juga telah meninggalkan perkataan-
D perkataan yang disebut oleh plaintif di Parlimen, seperti yang dilaporkan dalam Penyata Rasmi, yang jelas menunjukkan bahawa plaintif bukan pihak yang telah bertindak secara provokatif. Beliau hanya menjawab cabaran untuk bergaduh oleh YB Shahziman; dan bahawa plaintif telah menyatakan sebanyak dua kali bahawa
E kehadirannya di Parlimen bukan untuk bergaduh dengan sesiapa tetapi untuk mengambil bahagian dalam debat. Berdasarkan Penyata Rasmi, melalui laporan akhbar tersebut, defendan-defendan telah secara salah, memburukkan plaintif. Dalam perkataan lain, jauh daripada menyatakan kebenaran, berita dalam akhbar tersebut tidak lain daripada
F putar belit mengenai apa yang sebenarnya telah berlaku di Parlimen.

(3) Dakwaan terhadap plaintif adalah serius memandangkan bahawa beliau adalah seorang MP dan perkara tersebut adalah tentang kelakuan tidak terkawal dan agresif di Parlimen. Walaupun pemberita menyatakan bahawa suasana di Parlimen semasa debat tersebut pada ketika itu
G adalah kucar kacir, tetapi pemberita tersebut dan defendan pertama, sebagai editor, tidak mengambil langkah-langkah untuk mengesahkan fakta-fakta dengan menunggu laporan Penyata Rasmi dan tidak ada keperluan untuk terburu-buru menerbitkan berita tersebut. Defendan-defendan tidak mengambil langkah untuk meminta komen daripada
H plaintif berkaitan insiden tersebut, khususnya untuk mendapatkan versinya tentang apa yang sebenarnya telah berlaku. Berita tersebut bukan perkara yang mempunyai kepentingan umum. Walau bagaimanapun, terdapat niat jahat pada pihak defendan-defendan seperti yang ditunjukkan melalui cara insiden tersebut dilaporkan; terdapat
I tindakan sengaja 'mengambil dan memilih' dan 'menghitamkan' fakta-fakta yang memihak kepada plaintif.

(4) Mempertimbangkan status plaintif sebagai MP dan kedudukan kanan dalam parti PAS, keseriusan dakwaan dan fakta bahawa terdapat niat jahat pada pihak defendan-defendan, award bagi ganti rugi teruk adalah adil.

Case(s) referred to:
Adam v. Ward [1917] AC 309 ***(refd)***
Harrison v. Bush [1855] 5 E & B 344 ***(refd)***
Pullman v. Hill & Co [1891] 1 QB 524 ***(refd)***
Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(refd)***

Other source(s) referred to:
Gatley on Libel and Slander, 12th edn, pp 533-535, para 14.2

For the appellants - Nad Segaran (Soo Siew Mei with him); M/s Shearn Delamore & Co
For the respondent - Mohamed Hanipa; M/s Mohamed Hanipa & Assoc

[Appeal from High Court, Shah Alam; Originating Summons No: S6-23-46-2001]

Reported by S Barathi

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] The appellants were the defendants at the High Court of Shah Alam, and are now appealing before this court against the High Court's decision. The respondent was the plaintiff at the High Court.

[2] On 19 August 2009, the learned High Court Judge of Shah Alam after a full trial found the defendants liable for defaming the plaintiff and had awarded the latter damages: RM20,000 in general damages, to be paid by the first defendant; RM20,000 in general damages, to be paid by the second defendant; aggravated damages of RM110,000, to be paid by the second defendant.

[3] Hence the appeal to this court. The appeal is against both liability and quantum of damages.

[4] On 21 May 2014, after having heard submissions, we had unanimously dismissed the appeal and affirmed the decision of the High Court Judge on both liability and damages.

[5] We shall now explain the grounds of our decision.

Facts Of The Case

[6] At the material time the plaintiff was a Member of Parliament (MP), an Opposition MP. He was also the head of the youth wing of the political party, known by the acronym 'PAS', and a member of the party's central working committee.

[7] The first defendant, Dato' Ahmad Rejal Arbee, was an employee of the second defendant, The New Straits Times Press (Malaysia) Bhd: he was the group editor of the second defendant's newspaper, Berita Harian.

[8] The second defendant was the publisher and printer of the Berita Harian.

[9] The Berita Harian newspaper enjoys a nationwide circulation.

[10] The subject matter of the plaintiff's defamation action is a piece of news published in the Berita Harian on 9 November 2002 under the heading:

> Mahfuz ajak wakil BN bertumbuk.

[11] The undisputed facts, including the offending part of the news, are set out in paras. 5 to 7 of the statement of claim. Briefly, the news alleged that the plaintiff had misbehaved himself and created a nuisance during a debate in Parliament on 8 November 2000 by challenging another Member of Parliament to a fist fight outside the Parliament building. The incident occurred during the debate on the plaintiff's motion in Parliament on the alleged abuse of power on the part of the police force when taking action against a public gathering at Kampung Jalan Kebun, Kelang. The plaintiff avers in his statement of claim:

> 5. On Thursday dated 9/11/2002 the First Defendant acting as group editor of Berita Harian had falsely and maliciously allowed or caused to be allowed a publication of defamatory news at the front page of the said newspaper concerning the Plaintiff in the following words:
>
> **Mahfuz ajak wakil BN bertumbuk**
>
> Kuala Lumpur, Rabu – Pihak pembangkang sekali lagi membuat kecoh di Dewan Rakyat hari ini, apabila seorang Ahli Parlimen Pas mencabar seorang Ahli Parlimen Barisan Nasional (BN) untuk bertumbuk bagi menyelesaikan perbalahan.
>
> Ketika membahaskan usul berhubung apa yang dikatakan tindakan ganas polis terhadap peserta perhimpunan haram di Klang Ahad lalu, Mahfuz Omar (Pas – Pokok Sena) mencabar Shahziman Abu Bakar (BN-Tampin) bertumbuk di luar Dewan Rakyat.
>
> Bagaimanapun, Shahziman dihalang oleh beberapa penyokong kerajaan yang lain yang turut meminta Mahfuz supaya bersabar.
>
> 6. The second defendant acting as the publisher and the printer of the said newspaper had published and printed the said defamatory words mentioned in paragraph 5 of the Statement of Claim.
>
> 7. The said words mentioned in paragraph 5 of the statement of claim directly or indirectly refers to the Plaintiff or capable of being understood to refer to the Plaintiff.

Particulars of words referred to or understood to refer to the Plaintiff

Mahfuz ajak wakil BN bertumbuk

Kuala Lumpur, Rabu – Pihak pembangkang sekali lagi membuat kecoh di Dewan Rakyat hari ini, apabila seorang Ahli Parlimen Pas mencabar seorang Ahli Parlimen Barisan Nasional (BN) untuk bertumbuk bagi menyelesaikan perbalahan.

Ketika membahaskan usul berhubung apa yang dikatakan tindakan ganas polis terhadap peserta perhimpunan haram di Klang Ahad lalu, Mahfuz Omar (Pas – Pokok Sena) mencabar Shahziman Abu Bakar (BN-Tampin) bertumbuk di luar Dewan Rakyat.

[12] In para. 8 of the statement of claim, the plaintiff explains why he alleges that the news is defamatory. He avers:

8. The aforementioned words stated in paragraphs 5 and 7 of the Statement of claim in their natural and ordinary meanings meant or understood to mean:

(a) that the Plaintiff being a member of parliament (MP) and a Pas's leader is a violent and gangster (thug or hooligan), likes to fight and used to invite others to fight (with him);

(b) that the Plaintiff had challenged the BN's member of Parliament (MP) namely Shahziman Abu Bakar for a fight outside the Parliament's house;

(c) that the Plaintiff is a MP who likes to create nuisance and disturbances in the Parliament's house;

(d) that the Plaintiff had failed to show any respect or dignity to the Parliament's house when he created nuisance and trouble and had challenged the BN's MP for a fight;

(e) that the Plaintiff as a leader of an Islamic Party has failed to behave as an Islamic leader who possessed an Islamic ethics;

(f) that the Plaintiff is unfit to be in the Parliament's house as he is emotional, a gangster, egotistical and likes to fight.

Is The News Defamatory?

[13] Although in the present case one of the grounds of appeal is that the news about the plaintiff is not defamatory, we find no difficulty in agreeing with the plaintiff and the learned High Court Judge that the news is defamatory of the plaintiff.

[14] So, we propose not to labour on this issue but to proceed to consider the two defences raised.

The Defence Of Justification

[15] One of the two defences raised by the defendants is the defence of justification. The defendants claim that what was published about the plaintiff in the newspaper report was a true account of what transpired in

Parliament during the debate on 8 November 2000, in that the plaintiff did challenge a Member of Parliament of the constituency of Tampin, from the Barisan Nasional party (the ruling party), namely, one YB Shahziman Abu Bakar to a fist fight outside Parliament. The defendants relied on the following excerpts from the report in the Hansard that state:

> Siapa cabar saya untuk bertumbuk? Saya sedia untuk bertumbuk bila-bila masa boleh! Di simpang mana, jalan mana saya boleh tunggu.

[16] The plaintiff admits having uttered these words in Parliament. In fact, the parties in the action accept that the report in the Hansard on the Parliamentary proceedings was an authoritative report of the proceedings. However, the plaintiff in his evidence denied making the alleged challenge. It is the assertion of the plaintiff that the person who actually made the challenge (to a fight) to him was the said YB Shahziman; and that this is borne out by the Hansard. The plaintiff complains that the newspaper report in the Berita Harian was made in a selective manner and did not narrate in full of what had actually transpired in Parliament during the debate. In other words, the words (the alleged challenge) attributed to the plaintiff was not reported in the Berita Harian in the proper context. This is what the plaintiff said in evidence.

> Di satu peringkat ketika mana perbahasan sedang berlangsung Y.B dari kawasan Tampin iaitu Y.B Shahziman Abu Bakar telah bangun dan dengan wajah yang penuh emosi, mengeluarkan kata-kata yang kasar dan bertindak seolah-olah ingin melompat dari kerusi beliau dan menuju ke arah saya, telah mengangkat tangan beliau dan mengajak saya ke luar dewan melalui isyarat tangan beliau untuk bertumbuk atau bergaduh di luar dewan.
>
> S: Bagaimanakah keadaan beliau atau riak wajah (Y.B Shahziman Abu Bakar) pada masa itu?
>
> J: Beliau berdiri dalam keadaan yang amat beremosi dan marah sepertimana emosi seseorang yang ingin bergaduh atau bertumbuk dengan seseorang yang lain dan beliau telah ditenangkan oleh beberapa ahli Parlimen BN yang duduk berdekatan dengan kerusi beliau yang telah meminta beliau untuk duduk.
>
> S: Sila rujuk kepada dokumen di ms 1-29 Ikatan Dokumen Yang Dipersetujui, apakah dokumen tersebut?
>
> J: Ia adalah Penyata Rasmi Parlimen atau juga dikenali sebagai Hansard Parlimen bertarikh 8hb November 2000 dan setiap ahli Parlimen dibekalkan dengan Hansard tersebut.
>
> S: Sila rujuk kepada ms 27 Ikatan Dokumen Yang Dipersetujui tersebut di mana ditulis bahawa (Yang Berhormat bahagian Tampin bangun dan mengangkat-angkat tangan menunjuk ke arah luar Dewan) adakah itu yang anda maksudkan sebelum ini bahawa Y.B Tampin iaitu Y.B Shahziman Abu Bakar mengajak anda keluar Dewan untuk bertumbuk?

J: Ya, itu yang saya maksudkan.

S: Sila rujuk kepada m.s. 27 Ikatan Dokumen Yang Dipersetujui tersebut di mana ditulis juga "Seorang Ahli: Hei Man, Man ... Man duduk Man." Adakah Man itu merujuk kepada Y.B Shahziman Abu Bakar?

J: Benar, ia merujuk kepada beliau.

S: Adakah anda ingat siapakah "seorang ahli tersebut" yang dinyatakan di m.s. 27 Ikatan Dokumen tersebut.

J: Saya tidak ingat siapa ahli Parlimen tersebut tetapi ia adalah salah seorang yang cuba menenangkan Y.B Tampin tersebut.

S: Selepas diajak bertumbuk oleh Y.B Tampin tersebut apakah yang seterusnya berlaku?

J: Saya ada memberitahu secara umum di dewan tersebut meminta supaya Ahli-ahli Parlimen BN jangan bertindak kurang ajar dan jangan cabar hendak bertumbuk kerana saya hendak berhujah di dewan tersebut dan bukannya hendak bertumbuk.

S: Jika dilihat kepada m.s. 28 Ikatan Dokumen Yang Dipersetujui ada dinyatakan bahawa anda mengatakan "siapa cabar saya untuk bertumbuk? Saya bersedia untuk bertumbuk bila-bila masa, boleh! Di simpang mana, jalan mana saya boleh tunggu." Boleh anda jelaskan?

J: Kata-kata yang dinyatakan tersebut adalah reaksi spontan yang saya berikan sebagai respon kepada cabaran untuk mengajak saya bertumbuk oleh Y.B Tampin tersebut jika beliau benar-benar berhasrat untuk mengajak saya bertumbuk. Bagaimanapun kata-kata saya tersebut perlu dilihat dalam konteks di mana bukan saya yang lebih dahulu mencabar mana-mana pihak untuk bertumbuk dan saya juga sebelum dan selepas daripada mengeluarkan kata-kata tersebut dengan jelas menyatakan bahawa saya bukan ingin bertumbuk sebaliknya ingin berhujah.

[17] In order to appreciate fully the plaintiff's evidence, we shall set out the relevant parts of the report in the Hansard. They read:

[Yang Berhormat bagi Tampin bangun dan mengangkat-angkat tangan menunjuk ke arah luar Dewan]

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Yang Berhormat …

Seorang Ahli: Hei Man … Man … Man duduk Man

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Pokok Sena

[Dewan riuh]

Seorang Ahli: Pokok Sena relekslah

Datuk Ruhanie bin Haji Ahmad: Tuan Yang di-Pertua …

[Semua ahli pembangkang bangun]

A Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Yang Berhormat semua. Sabar Yang Berhormat.

Datuk Ruhanie bin Haji Ahmad: Tuan Yang di-Pertua …

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Yang Berhormat …

B Tuan Haji Mahfuz bin Haji Omar: Sila. Sila. Sila. [Mengajak penyokong kerajaan keluar]

Tuan Yang di-Pertua [Datuk Lim Si Cheng]: Sila semua duduk. Semua duduk.

C Tuan Haji Mahfuz bin Haji Omar: Bangkit. Sila bangkit.

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Yang Berhormat. Ini Dewan. Ini Dewan. Semua Ahli Yang Berhormat …

Tuan Haji Mahfuz bin Haji Omar: Jangan hendak kurang ajar. Jangan hendak cabar hendak bertumbuk, saya hendak berhujah. [Dewan riuh].

D Tuan Mohamad bin Sabu: [Menyampuk]. Saya tidak jahat.

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Pokok Sena tolonglah bertenang. Ini kena hormati.

Tuan Haji Mahfuz bin Haji Omar: Kami mempertahankan hak rakyat,
E Tuan Yang di-Pertua. Kami bukan mempertahankan hak pemimpin UMNO. Ini hak rakyat.

Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Kalau hendak pertahankan hak rakyat juga kena mematuhi undang-undang, peraturan mesyuarat, peraturan Dewan.

F Tuan Haji Mahfuz bin Haji Omar: Siapa cabar saya untuk bertumbuk? Saya bersedia untuk bertumbuk bila-bila masa, boleh! Di simpang mana, jalan mana saya boleh tunggu.

Seorang Ahli: Duduklah

G Tuan Haji Mahfuz bin Haji Omar: Saya bukan datang untuk bertumbuk, saya datang untuk berhujah.

Seorang Ahli: Gangsterkah?

[18] The reporter of the Berita Harian who wrote the news in question, one Wan Hazmir Bakar (DW1), in his evidence, said that he was present in
H Parliament during the debate and he witnessed the incident. He said the atmosphere then was chaotic (riuh rendah). He admitted during cross-examination that at the time when he wrote his report for the Berita Harian he did not have the benefit of the Hansard report, which was only published a few days later after the event.

I **[19]** If we are to scrutinise the above Hansard report and were to compare it with the newspaper report in question, we will find that there are obvious omissions of material facts in the latter.

[20] Besides DW1, the defence also called Y.B. Shahziman as a witness (DW2). DW2 denied that he had behaved in a provocative manner. In his evidence he alleged that it was the plaintiff who made the challenge to a fight.

[21] Thus there was conflicting evidence.

[22] The first defendant (the group editor of Berita Harian) was not called by the defence to testify.

[23] The learned trial judge, having evaluated the evidence, rejected the defence of justification. In the words of the learned judge, in his grounds of judgment:

> The impugned words as contained in the newspaper report do not portray the actual and true sequence of events during the Parliamentary debate before and after the plaintiff stated the words to the said MP. I find that the defendants have merely taken the portion of the sequence of events during the Parliamentary debate *viz.* the words of the plaintiff that could infer the plaintiff as a violent and uncouth person and printed and published the words. I am unable to accept the argument of the defendants that they are justified in imputing that the plaintiff had truly challenged the said MP to a fight because the defendants have intentionally omitted material parts of the transpired events during the Parliamentary debate. The omitted parts are *viz.* the action of the said MP in gesturing the plaintiff to a fight outside the Parliament and the additional words stated by the plaintiff after the commotion had abated. The omitted parts are vital to evidence that the plaintiff had said the words in response to the said MP's gesture during the Parliamentary debate and not for the sole purpose of inciting strife and disturbance as imputed by the defendants.

[24] With respect, we find that on the evidence and the established facts there is no justification to interfere with the above findings of the learned trial judge and his rejection of the defence of justification.

[25] In our judgment, looking at the scenario in totality as to what really were the exchanges of words that took place between the plaintiff and Y.B. Shahziman in Parliament, as revealed by the report in the Hansard, the learned trial judge was correct in rejecting the defence of justification.

[26] Having examined the evidence, in particular the Hansard, we note – as did the learned trial judge – that there is failure on the part of the defendants to mention in their newspaper report on the following provocative conduct of Y.B. Shahziman.

> [Yang Berhormat bagi Tampin bangun dan mengangkat-angkat tangan menunjuk ke arah luar Dewan]
>
> Timbalan Yang di-Pertua [Datuk Lim Si Cheng]: Yang Berhormat …
>
> Seorang Ahli: Hei Man … Man … Man duduk Man

[27] The defendants had also omitted from the newspaper report the following words uttered by the plaintiff in Parliament as reported in the Hansard which clearly show that the plaintiff was not the party that had acted in a provocative manner. He was merely responding to the challenge for a fight by the said Y.B. Shahziman; and that the plaintiff had said twice that he came to Parliament not to fight with anyone but to participate in the debate:

> Tuan Haji Mahfuz bin Haji Omar: Jangan hendak kurang ajar. Jangan hendak cabar hendak bertumbuk, saya hendak berhujah. [Dewan riuh].
>
> ...
>
> Tuan Haji Mahfuz bin Haji Omar: Saya bukan datang untuk bertumbuk, saya datang untuk berhujah.

[28] Thus, as we see it, in the light of the Hansard, *via* the news in the Berita Harian under the heading:

> Mahfuz ajak wakil BN bertumbuk

The defendants had placed the plaintiff, wrongly, in a bad light, instead of Y.B. Shahziman. In other words, far from stating the truth, the news in the Berita Harian is nothing but a distortion of what actually transpired in Parliament.

The Defence Of Qualified Privilege: The Reynolds Principles

[29] The other defence of the defendants is the defence of qualified privilege on the principles as enunciated in the House of Lords case of *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 ('the Reynolds principles').

[30] This defence was also rejected by the learned trial judge.

[31] Prior to the formulation of the *Reynolds* principles in 2001 by the House of Lords, the common law principles on qualified privilege are as stated by the English courts in a number of cases. For instance, in *Harrison v. Bush* [1855] 5 E & B 344 Lord Campbell CJ stated the law as follows (at p. 348):

> A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privilege, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable.

[32] In *Pullman v. Hill & Co* [1891] 1 QB 524 Lord Esher MR said (at p. 528):

> An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged.

[33] In *Adam v. Ward* [1917] AC 309 Lord Atkinson emphasised the importance of reciprocity in the following words (at p. 334):

> It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[34] Then came *Reynolds* case in 2001 which further develops the common law principles on qualified privilege. The scope of the defence of qualified privilege is now extended to what is known as 'responsible journalism'. This defence is best explained by *Gatley on Libel and Slander,* 12th edn (at pp. 533-535, para. 14.2):

> *Reynolds v. Times Newspapers Ltd.* As a result of *Reynolds v. Times Newspapers Ltd* there is now a much more extensive protection for publications to the public at large where the matter is of sufficient public concern. Although this category is classified as one of qualified rather than absolute privilege, it is of rather a different nature from the "classical" privilege founded on a relationship. In very many cases of the latter type the existence of a privileged "occasion" will be well-established by previous case law dealing with standard situations (eg, the writing of a reference, the making of a complaint about the provision of services or the transmission of information within a group or organization which affects the interests of its members) and the protection does not depend upon the extent to which the maker of the statement has made proper investigations: once the occasion is held to be a privileged one, the issue is whether the defendant acted honestly (ie, without malice) not whether he behaved reasonably or took due care.
>
> The *Reynolds* category is not confined to publication through "media", though in practice that will be the context of almost all the cases. The very existence of the privilege in this type of case, however, is a matter which involves a closer scrutiny of the facts of the particular case. It involves questions like the extent to which the defendant took steps to verify the information he imparts, the urgency of the matter, the extent of the public's "right to know" about it and whether the defendant has sought any explanation or comment from the person about whom the statement is made. Thus while one can say that the writer of a reference has privilege for any statement which is relevant to the proposed employment, one cannot say, in the abstract, that a newspaper does or does not have privilege at common law for a news story. That question has been described as one of whether the newspaper conformed to the standards of "responsible journalism".
>
> > The ... duty on the journalist (and equally his editor) ... is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with

A the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise. That is not the case with regard to the more conventional situations in which qualified privilege arises. A person giving a reference or reporting a crime need not act responsibly: his communication will be privileged subject only to relevance and
B malice.

Here it is not so much the "occasion" which is privileged (which has been the traditional approach) as the publication. If, on the other hand, the newspaper's case passes the test of responsible journalism that will determine the case in its favour. Writing a reference is a privileged
C occasion but the writer may or may not be guilty of malice; but it is hard to see how a person who complied with the standards of responsible journalism could at the same time be malicious.

There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged.
D

[35] In *Reynolds* Lord Nicholls of Birkenhead lists out the factors to be taken into account by the court in deciding as to whether or not an author of an impugned publication claiming responsible journalism is entitled to avail himself the defence of qualified privilege based on the *Reynolds*
E principles.

[36] This is what the learned Law Lord said (at p. 255):

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge,
F the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the
G information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7.Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8.
H Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.10.The circumstances of the publication, including the timing.

I This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.

…

> In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

[37] Now, applying the factors above as enumerated by Lord Nicholls to the facts of the present case, but bearing in mind the importance of the role of the press in disseminating information to the public and the importance of freedom of speech, we are inclined to dismiss the defence of qualified privilege. For, on the facts of the present case, the factors point in favour of the plaintiff. Firstly, the allegation against the plaintiff is a serious one, considering that he is a Member of Parliament and it was about his (alleged) unruly and aggressive behaviour in Parliament. Secondly, although DW1 said that the atmosphere then in Parliament during the debate was chaotic, yet neither the reporter (DW1) nor the first defendant, as an editor, took steps to verify the facts by waiting for the Hansard report. Thirdly, there was no urgency to publish the news. Fourthly, the defendants made no effort to seek comments from the plaintiff on the incident, particularly, to obtain his version of what actually transpired. Fifthly, the news is not a matter of public importance. In any event, on the facts, we find that clearly there was malice on the part of the defendants as shown by the manner the incident was reported: there was a deliberate act of 'pick and choose', and 'blacking out' of facts that were favourable to the plaintiff.

On Damages

[38] The only complaint of the defendants is on the award of aggravated damages. The defendants contend that the award of RM110,000 is excessive. On our part, considering the status of the plaintiff as a Member of Parliament and his senior position in the PAS party, the seriousness of the allegation, and the fact that there was malice on the part of the defendants, we are of the view that the award of RM110,000 as aggravated damages is fair.

Appeal dismissed with costs.